

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of

Notice of Proposed Rulemaking
on the Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

MM Docket No. 97-182
FCC 97-296

To: The Commission

COMMENTS OF THE AMERICAN PLANNING ASSOCIATION

The American Planning Association is a non-profit public interest and research organization representing 30,000 practicing planners, officials, and citizens involved with urban and rural planning issues. Sixty-five percent of APA's membership are directly employed by state and local government agencies. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land use regulations. APA's objective is to encourage planning that will contribute to the environmental, economic and social well-being of American communities.

We support efforts by federal, state and local governments to encourage the adoption of new communications technologies and to ensure access to them by all Americans. Nevertheless, we have strong reservations about the wisdom and legitimacy of the proposed rule which the Commission is considering to preempt state and local land use procedures regulating the placement of broadcast transmission facilities.

While there may be a broad public interest in promoting rapid deployment of digital television in terms of anticipated domestic job creation, international competitive advantages for U.S. companies, and the reduction of the deficit through the resale of recovered broadcast spectrum, we do not believe that these outweigh the greater public interest in maintaining local community control over land use development decisions. Therefore we are strongly opposed to the proposed rule, which would ride roughshod over citizens legitimate concerns and well-established due process largely in the interest of aiding a single industry to meet an arbitrary schedule for the deployment of one technology.

The proposed rule would impose blanket permit review periods on all state and local governments, ranging from 21 to 45 days. It would require permits for the modification, re-location or new construction of broadcast facilities to be approved automatically if local authorities could not review the applications within these stringent time periods. Moreover, it would enable broadcasters to appeal decisions directly to the Commission, circumventing both established local procedures and the courts.

Clearly the Commission would be exceeding the authority granted to it by Congress were it to adopt these provisions. In Section 704 of the Communications Act of 1934 as amended in 1996, Congress strongly upheld the authority of local governments to make land use decisions, including those governing the size and siting of communications facilities, within a reasonable period of time. The Conference Report accompanying the Act (H.Rept. 104-458) underscores and clarifies Congressional intent in this area. Local practice, as approved by duly elected officials, defines what a reasonable period of time is, not dictates from Washington. Nor did Congress direct, or intend the Commission to mandate, preferential treatment by local authorities for permit applications concerning any particular communications technology over another, or for applications for communications facilities in general versus all other types

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of land use development.

As for appeals, Congress clearly stated in Section 704 of the Act, that parties denied a permit, having exhausted the appeals process established by state or local authorities, should resort to a court of competent jurisdiction, not to the Federal Communications Commission. The proposed rule flies in the face of well-established precedent as well as Congressional intent. If adopted, it would in effect turn the Commission into a national Zoning Board of Appeals. Aside from turning federalism on its head, such a scenario raises questions about the capacity of Commission members and staff to adjudicate on local land use decisions from countless communities.

The proposed rule would also limit state and local review of digital broadcast facility applications to matters of safety only. The Communications Act of 1934 as amended in 1982 and 1996 does establish parameters for decisions made on the basis of health and interference concerns arising from radiofrequency emissions. Similarly, it requires that communications facilities, at a minimum, abide by the height and lighting restrictions established by the Federal Aviation Administration. Beyond these grounds for the preemption of state or local land use decisions, Congress leaves the field open for those authorities to consider the full range of economic, environmental and aesthetic impacts when weighing the merits of proposed facility siting and construction.

Were the Commission to adopt the proposed rule limiting state and local review only to safety considerations, it would fly in the face of Congressional intent and in the face of Supreme Court decisions upholding the right of communities to consider aesthetic, environmental, and economic aspects of proposed land uses, as well as health and safety issues (*Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

We note that in paragraph 16 of the proposed rule, the Commission states that there are now over 12,000 radio and 1,500 television station licensees in the United States. We assume that all of these entities, whether they are operating as for-profit or non-profit concerns, have submitted to local land use and zoning procedures for many decades now without any diminution of their ability to flourish in the marketplace. As enticing as high definition television may be on aesthetic as well as economic grounds, we do not believe its deployment over the coming years warrants the flagrant violation of community land use prerogatives, as established by the courts and supported by Congress. Nor were there to be a compelling case for such preemption do we see any justification for extending it to all forms of radio and television facilities as the proposed rule seeks to do.

In conclusion, we urge the Commission to terminate its proposed rulemaking in this matter and, as recommended by the Commission's own Local and State Government Advisory Committee (Recommendation No. 3), to invest its resources in educating the parties to these discussions about the needs of the new broadcast technologies and the legitimate concerns of local communities.

Respectfully submitted,



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